No. 96-1522

(3)
FILED
APR 25 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY,
Petitioner,

v.

CAROLEE BRADY HARTMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

BRUCE A. FREDRICKSON *
SUSAN L. BRACKSHAW
LINDA M. CORREIA
JONATHAN C. PUTH
WEBSTER & FREDRICKSON
1819 H Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 659-8510

* *Counsel of Record for the Respondents*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
RESPONDENTS' COUNTER-STATEMENT OF THE CASE	1
CORRECTION OF MISSTATEMENTS IN PETITION	4
REASONS FOR DENYING THE WRIT	6
I. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS CERTIFIED THE CLASS SOLELY ON THE BASIS OF STATISTICAL EVIDENCE	6
II. PETITIONER WAIVED HIS EXHAUSTION ARGUMENT BY FAILING TO RAISE THIS ISSUE IN HIS FIRST APPEAL	17
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: Page

Bermudez v. United States Dep't of Agric., 490 F.2d 718 (D.C. Cir.), *cert. denied*, 414 U.S. 1104 (1973) 7

Bishop v. New York City Dep't of Housing Preservation and Development, 141 F.R.D. 229 (S.D.N.Y. 1992) 16

Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983) 16

Chaffin v. Rheem Mfg. Co., 904 F.2d 1269 (8th Cir. 1990) 11

Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir.), *cert. denied*, 116 S.Ct. 180 (1995) 22

East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) 6

Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981) 19, 21

General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) 6, 7, 16

Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1181 (1985) 22

McCarthy v. Kleindienst, 741 F.2d 1406 (D.C. Cir. 1984) 14

Northwestern Indiana Tel. Co. v. FCC, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990) 22

Wagner v. Taylor, 836 F.2d 566 (D.C. Cir. 1987) 13

Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987) 14

Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243 (D.C. Cir. 1987) 22

Zipes v. Trans World Airlines, 455 U.S. 385 (1982) 22

Rule:

Supreme Court Rule 15.2 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1522

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY,
Petitioner,

v.

CAROLEE BRADY HARTMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

This class action, challenging sex-based discrimination in hiring in six major job categories at the United States Information Agency, recently entered its twenty-first year in the courts. So far the litigation has bred three decisions by the Court of Appeals for the District of Columbia Circuit, of which the two most recent are pertinent here. In 1994, the court of appeals first considered the agency's objection to class certification, which was grounded on an

asserted impropriety in fashioning a class comprised of applicants for civil service as well as foreign service positions. App. 208a. At that time, the agency could have pursued, but did not, the argument that class treatment was improper because the named plaintiffs did not adequately exhaust their administrative remedies on behalf of the proposed class members.

The court of appeals ruled in 1994 [1] that it lacked sufficient information to determine whether certification was proper and remanded for more detailed factual findings. App. 242a-245a. The court of appeals cautioned against *sole* reliance upon trial statistics showing hiring disparities to support class certification because the statistics did not distinguish between civil service and foreign service hiring, the heart of the agency's 1994 challenge to class certification. App. 240a-241a, 244a. On remand, the district court then scrupulously adhered to the instructions of the court of appeals, avoided completely any consideration of statistical evidence, found discriminatory practices common to all job categories at issue, and determined both that class certification was proper at the time it was originally granted and that class certification is proper today. App. 246a.

The agency again appealed, leading to the 1996 decision that is the subject of this Petition. In its second appeal on class certification, however, the agency abandoned what had earlier been its central argument—that it was improper to certify a class comprised of both foreign service and civil service applicants. App. 9a. In these circumstances, the

---

[1] For ease of this Court in its review of the Petition and Opposition, Respondents will refer to the 1996 ruling of the court of appeals below as the "1996 appeal" and the ruling of the prior panel of the court of appeals as the "1994 appeal."

court of appeals not surprisingly ruled that the district court had not abused its discretion in certifying the class. App. 9a. In so doing, the court noted that a concern it had voiced about statistical evidence in its 1994 decision had dissipated, since that concern had been premised on a supposed distinction between civil service and foreign service positions. App. 8a-9a. With the agency no longer pressing that distinction, the statistics provided additional support for class certification. App. 9a.

In its 1996 appeal, the agency also sought to argue that certain named intervenors, whose intervention had been permitted by the district court pursuant to the court of appeals' suggestion in its 1994 decision, had failed to exhaust their administrative remedies. The court of appeals properly held that the agency waived any argument on exhaustion, because it could have been made at the time of the 1994 appeal and was not. App. 4a-5a. In its request for rehearing below, the agency acknowledged that the court's point was "literally true." Petition for Rehearing and Suggestion for Rehearing *En Banc*, at 13.

The court of appeals in 1996 also upheld the district court's finding that the agency had engaged in class-wide discrimination in hiring. App. 13a. The agency does not seek review of this liability determination and has instead confined its petition to issues of class certification and intervention.

As is evident, there is nothing novel here. Class certification was upheld after the district court had engaged in voluminous fact finding on the certification issue—and after the agency had either abandoned or waived key arguments. Given this background, review by this Court is not warranted.

CORRECTION OF MISSTATEMENTS IN PETITION

Under Supreme Court Rule 15.2, and in discharge of those obligations on Respondents, Respondents are compelled to correct Petitioner's Petition for Writ of Certiorari as the Petition contains several errors of fact and statements of holdings. Additionally, Petitioner has failed to preserve the very issues upon which he seeks review by this Court.

First, despite Petitioner's designation of the first issue—"Whether a class action may be certified in a sex discrimination case *solely* on the basis of statistical evidence of sex hiring disparities in the job categories at issue"—any fair statement of the ruling of the United States Court of Appeals for the District of Columbia Circuit reveals that the court of appeals did not so hold. App. 9a; Pet. Questions Presented (emphasis added). The actual holding of the court of appeals—that the agency did not demonstrate abuse of discretion by the district court on the issue of class certification—has not been appealed, and therefore, Petitioner has failed to preserve any objection to the class certification decision below.

Second, the first question presented by Petitioner further implies that the district court certified the class solely on the basis of statistics. To the contrary, the district court actually disavowed any reliance upon the statistics in determining that the class was and is properly certified. App. 270a. Instead, the district court identified four common practices which cut across the six job categories, practices which served as the basis for class certification. App. 271a-272a.

Third, Petitioner claims error with regard to the court of appeals' determination that the agency

waived objections to class certification where the class contains both civil service and foreign service job categories, the central issue in the agency's 1994 appeal. Pet. 22. In fact, the agency did not raise the issue at all in its 1996 appeal. App. 9a. At the same time, Petitioner concedes his failure to raise this issue before the court of appeals in 1996. Pet. 22.

Fourth, Petitioner has not appealed the court of appeals' affirmance of the district court's decision that class certification was proper in 1978 and 1979. That decision of the district court did not rely, in any respect, upon the granting of intervention. Thus, Petitioner's argument regarding whether he has waived his argument on exhaustion of administrative remedies is moot.

Fifth, Petitioner argues that the 1996 court of appeals' opinion would require Title VII employers to conduct broad, searching discovery of unnamed class members to avoid waiving an employer's right to oppose later intervention. Pet. 24-25. Petitioner has not preserved such an argument as he himself stipulated before the district court that the record was sufficient to decide class certification issues without discovery. App. 272a, n.9.[2]

---

[2] Respondent notes that the Petition contains other misstatements, in particular, the representation that the court of appeals in 1996 determined that the number of foreign service officer positions to be set aside for class members (39) was excessive. Pet. 6, n.4. To the contrary, the court of appeals merely ruled that it could not determine how the district court made the calculation and remanded the issue "to the district court to sort out this conundrum." App. 13a-14a. Similarly, in his Statement, Petitioner represents that, in its 1988 remedial opinion, the district court "first narrowed the class to include only women who applied for one of the *specific*

REASONS FOR DENYING THE WRIT

I. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS CERTIFIED THE CLASS SOLELY ON THE BASIS OF STATISTICAL EVIDENCE.

Petitioner contends the question on appeal is "Whether a class action may be certified in a sex discrimination case *solely* on the basis of statistical evidence of sex hiring disparities in the job categories at issue." Pet. Questions Presented (emphasis added). Petitioner's question is fatally flawed because the district court, in determining the class certification issue and following directions from the previous panel in 1994, simply did not rely upon statistics at all. Rather, the district court scrupulously followed Supreme Court precedent in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), and the 1994 court of appeals' decision in *Hartman* by reviewing the record and identifying four common discriminatory practices which cut across the job categories at issue, without regard to statistics.

As this Court well knows, district courts exercise substantial discretion in the certification and manage-

---

six positions at issue in the suit. . . ." Pet. 5 (emphasis added). Rather than specific job titles, the district court ruled that the class consists of women who applied in one of six *job categories*. App. 115a-116a. The importance of this distinction is found, in part, in the Foreign Information Series, a composite series which includes both civil service and foreign service positions. *See* App. 117a. Finally, throughout his Petition (*see, e.g.*, Pet. 20-21), Petitioner does not accurately state the statistical basis for the liability findings in 1984. *See, infra*, n.6.

ment of class actions under Rule 23. *Bermudez v. United States Dep't of Agric.*, 490 F.2d 718, 725 (D.C. Cir.), *cert. denied*, 414 U.S. 1104 (1973). In *Hartman*, the district court on remand in 1994 fully complied with its responsibilities and properly exercised its discretion in affirming certification of the class. On review of class certification decisions, courts of appeals defer to district courts on class certification and overturn only those decisions where a district court has abused that considerable discretion. *Id.* Under the principles of *Falcon*, a district court properly exercises that discretion, for instance, when it certifies a class upon a showing that the class shares claims arising out of employment practices resulting in a common injury. *Falcon*, 457 U.S. at 159 n.15 (1982) ("if [an employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).")

In *Hartman*, under explicit instructions provided by the court of appeals in its 1994 opinion, the district court carefully reviewed its initial certification decision on the basis of the record that existed at the time, including the claims of the originally named plaintiffs. On this record, the district court found that the plaintiffs had fully established a variety of employment practices affecting the class as a whole—including overtly sexist comments and express preferences for males, subjective application of hiring criteria, unfair testing practices and procedures, active discouragement of females seeking to apply, concealment of vacancies by agency officials from qualified females, and preselection of male applicants,

practices used by the USIA without regard to job category and reflecting no differences whether the position was in the civil or foreign service. App. 269a-270a. The district court concluded that initial certification of the class was correct both with respect to commonality and typicality. App. 269a.

Thereafter, also in compliance with the court of appeals' direction, the district court found further that certification today was proper based on the record before it, including the additional evidence proffered by numerous class members, including the twenty intervenors. App. 271a-291a. On that elaborate and factually rich record, the district court detailed four specific employment practices, cutting across all job categories (including the foreign service) which practices served as discriminatory mechanisms against the class as a whole and resulting in a common injury. Specifically, the district court found:

> (1) overt discrimination and express limitations on the employment of women;
>
> (2) disparate application of subjective criteria to deny women positions, including biased evaluations of tests and credentials;
>
> (3) discouragement of female applicants, including the failure to respond to their applications; and
>
> (4) the use of discriminatory recruitment devices, including preselection of men, to avoid hiring qualified women.

App. 271a. Having identified the common discriminatory practices, the district court took great pains to detail its findings of each discriminatory practice through express reliance upon specific allegations

raised by named plaintiffs, trial witnesses, and other class members to show that the discriminatory practices were universally employed, without regard to the job category to which women applied. App. 272a-292a. The district court expressly found commonality between and among the members of the class, including the named plaintiffs, as to the practices from which they suffered. App. 272a-292a.

For instance, the district court reviewed evidence from women claiming that the USIA used biased evaluations and subjective criteria to discriminate on the basis of gender. In the words of the district court:

> Tests were administered in the hiring process for several positions at issue, including Foreign Language Broadcaster/International Radio Broadcaster, Radio Broadcast Technician, and Foreign Service Information Officer/Foreign Service Officer, as well as some Writer/Editor positions. The Plaintiffs allege that, throughout the administration of each of the tests implicated here, the Agency's predominantly male selecting officials and test graders undervalued the experience of female applicants, assigned women lower test scores than their performance merited, applied subjective versus objective criteria in evaluating female applicants, and required additional materials and procedures of female applicants than were required of male applicants. The Court finds that evidence of the USIA's use of gender-biased evaluations and discriminatory application of subjective criteria further supports the Court's determination that commonality exists here. Notably, these discriminatory practices cut across both civil service and foreign service positions, thereby addressing what the Court of Ap-

> peals considered to be "[t]he principal problem in the certification," that is, the fact "that it encompasses both civil service and foreign service applicants to the USIA, despite the fact that the two categories are hired under different personnel systems." *Hartman v. Duffey*, 19 F.3d at 1471.

App. 275a-276a (additional citations and footnotes omitted).

Similarly, the district court found that members of the class, including named plaintiffs, class members, and intervenors, were subjected to overt discrimination and express limitations on the employment of women, although with various manifestations. For instance, one female applicant was rejected because in the view of an agency official there were "enough women in the Foreign Service at mid-level." One was told that certain jobs were "mainly for men." Another was informed that the supervisor did not want "that many girls around." Still another was told that hiring her would hurt her marriage. One female applicant was counseled that she should stay at home and take care of her baby. A woman seeking a full-time professional position as a broadcaster was told that such a move was not a good idea for a woman with small children. Similarly, other female applicants were informed that the agency was seeking males for particular positions. App. 274a. On the basis of these allegations, the district court found "that a common thread exists of express limits on the hiring of women and the articulation of stereotypical views of women to female applicants" sufficient to support a finding of commonality of law or fact under Rule 23(a). App. 274a.

With respect to each of the other discriminatory practices, the district court proceeded in the same

fashion, carefully supporting its finding that each practice had been articulated and shared by class members, including named plaintiffs, in a similar manner, thereby supporting the district court's conclusion that the class suffered from a common injury. App. 283a. The district court concluded:

> The Court finds the Plaintiffs have demonstrated that the primary practices allegedly used to discriminate against women applicants cut across all job categories, including foreign service positions. As Appendices A and B demonstrate, class members who applied for **both** civil service positions and foreign service positions claim to have been subjected to the same or similar discriminatory practices. In addition, because these women were all denied positions with the Defendant as a result of these practices, they all suffered a common injury. The Court finds that this showing meets the commonality requirement of Rule 23(a).

App. 278a-279a; *see also* 282a-283a. Finally, the district court, mindful of the holdings of *Falcon* and *East Texas Motor Freight*, found that certification of this class fully met each and every requirement expressed or endorsed by this Court.[8] App. 291a-292a.

---

[8] This holding of course, disposes of any "tension" alleged by Petitioner between the court of appeals' holding in *Hartman* and the holdings of other courts. Petitioner relies upon *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269 (8th Cir. 1990), suggesting that the *Hartman* class resembles, in some regard, the *Chaffin* class. Petitioner's own statement of *Chaffin* compared to the class in *Hartman* demonstrates the lack of "tension." Pet. 15, n.7. According to Petitioner, the individual plaintiff in *Chaffin* "could point to only one or two black employees who might have been discriminated against in promotions, and otherwise relied on statistical evidence,

In its sixty-four page opinion, then, the district court meticulously and carefully followed the instructions of the 1994 court of appeals and its responsibilities under Rule 23 and found that the *Hartman* class easily met the requirements for class certification without reliance upon statistics. Moreover, conscious of the distinction argued by the USIA during the 1994 appeal, the district court thoroughly addressed the issue of whether the discriminatory practices alleged by the class cut across all job categories, including the foreign service. *See, e.g.*, App. 272a, 274a, 275a, 276a, 280a, 281a.

Petitioner appealed the district court's factually intense opinion, an appeal claiming that the district court relied solely upon "anecdotal evidence" and that such reliance was improper under the principles of *Falcon* to show commonality under Rule 23. Faced with a district court opinion which repeatedly stressed, with detailed findings, the commonality of discriminatory practices across civil and foreign service hiring systems, the USIA abandoned all objections to class certification arising from any apparent differences in hiring systems, the engine that had driven USIA's prior appeal resulting in the 1994 remand. App. 8a-9a.

Contrary to the arguments raised in the Petition, the 1996 court of appeals' holding fully comports with the court's authority to review class certification deci-

---

which the district court found to be 'bareboned.'" Pet. 15, n.7. Far from a lone named plaintiff with only one or two persons possibly affected, *Hartman* is comprised of more than 1,100 female applicants, asserting four common discriminatory practices, a number not including the more than 9,000 women who participated in the foreign service relief process. App. 214a.

sions. As explained by the 1994 panel, the standard of review of a class certification decision is narrow:

> A district court exercises broad discretion in deciding whether to permit a case to proceed as a class action. *Bermudez v. United States Dep't of Agric.*, 490 F.2d 718, 725 (D.C. Cir.), *cert. denied*, 414 U.S. 1104, 94 S.Ct. 737, 38 L.Ed.2d 559 (1973). In light of the fact that trial courts have the primary responsibility of ensuring the "orderly management of litigation" and that the purpose of class actions lies in "advanc[ing] the efficiency and economy of multi-party litigation," trial courts "are uniquely well situated to make class certification decisions." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984) (citations omitted). As a result, we review a class certification decision conservatively only to ensure against abuse of discretion or erroneous application of legal criteria. *Wagner*, 836 F.2d at 586.

App. 234a-235a.

Rejecting Petitioner's objections to class certification as insufficient to demonstrate abuse of discretion, the 1996 court of appeals panel, led by Judge Stephen F. Williams, joined unanimously by Judge Laurence H. Silberman and Judge Judith W. Rogers, affirmed the district court's certification of the class, both initially and currently. App. 9a. The court of appeals found that it need not resolve Petitioner's claim that the showing of commonality and typicality before the district court constituted "merely anecdotal evidence" because, in light of the standard of review, even if the panel were to agree wholly with Petitioner's characterization, such argument is insufficient to show abuse of discretion on the part of the district court. App. 9a, *citing Wagner v. Taylor*, 836 F.2d

566, 578 (D.C. Cir. 1987). *See also Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984) ("This deferential standard means that an appellate court may well affirm a district court's decision with respect to class certification *vel non* even though the appellate court would have ruled differently in the first instance.").

Specifically, the court of appeals held:

> Although the latest district court opinion understandably spent considerable time showing that the claimed discriminatory practices cut across both civil and foreign service categories, see, e.g., 158 F.R.D. at 536-37, 541, 546, the USIA has not, so far as class certification is concerned, addressed the civil service/foreign service difficulty at all on this appeal. So that issue is out of the case.
>
> There remains the general question whether plaintiffs showed sufficient commonality and typicality among the members of the plaintiff class. Under our prior instructions, the district court—as we noted above—identified four "practices" evidencing a common policy of discrimination that largely cut across job categories. 158 F.R.D. at 539. The defendant argues that these supposed "practices" amount simply to anecdotal evidence of subjective discrimination. We need not resolve that claim, however, for **even if we resolved it in the defendant's favor we would not find an abuse of discretion in the class certification.** *Wagner v. Taylor*, 836 F.2d 566, 578 (D.C. Cir. 1987) (reviewing for abuse of discretion).[4]

---

[4] Critically, Petitioner asserts no error with regard to the court of appeals' holding on abuse of discretion on either initial certification or current certification.

App. 8a-9a (emphasis added). Thus, the court of appeals properly held that, given the deference afforded to the district court, and in the absence of a showing of abuse of discretion, the court could not overturn the decision even were the appellate court to disagree factually with the district court. Fatal to the Petition, at no point did the court of appeals hold that it was affirming class certification *solely* on the basis of statistics.

Notably, however, only after having found no abuse of discretion in the district court's certification decision, the court of appeals recognized, with understandable consternation, that the USIA had wholly abandoned its prior objections to class certification, centering on the certification of a class comprised of both civil and foreign service applicants, an objection which resulted in significant additional delay in this now two-decade old litigation. App. 9a. With the USIA's abandonment of that issue, and thus any objection to the use of statistics encompassing both hiring systems,[5] the court of appeals went on to note that there was no barrier to additionally considering those statistics to support class certification.[6] App. 9a.

---

[5] Petitioner openly concedes that he has failed to raise this point while at the same time faulting the court of appeals for failing to preserve it for him. Pet. 22.

[6] In its 1984 liability opinion, the district court carefully analyzed the statistics offered by both parties. App. 94a-109a. Briefly summarized, the parties each offered expert labor economists who, *inter alia*, performed relevant labor market analyses of the agency's workforce with reference to these six occupations in the census data. In four of the six categories, the experts *agreed* that the agency underutilized women to a statistically significant degree regardless of whether the comparisons were made between the incumbent workforce

Since the court of appeals' opinion rests on a proper application of legal principles to the issue before it and does not rely solely upon statistics to affirm the district court's certification order, the decision at issue does not run afoul of this Court's holding in *Falcon*, as asserted by Petitioner.[7] Moreover, the court of appeals' consideration of statistics in aid of the class certification decision it had already affirmed does not give rise to error.[8] As the previous panel had held, "statistics can generally be probative of the question of commonality." App. 241a-242a, *citing, e.g., Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir. 1983) (anecdotal testimony and statistics show common issues of law and fact); *Bishop v. New York City Dep't of Housing Preservation and Development*, 141 F.R.D. 229 (S.D.N.Y. 1992) (same). The court of appeals, then, in addition to finding no abuse of discretion, could properly point to statistical evidence as an additional ground for class certification.

---

and the relevant labor market or the agency's hiring of females compared to the relevant labor market. In the remaining two categories, the experts' disagreement centered around the cross-mapping choices made by each expert. The district court adopted the cross-mapping recommended by the plaintiffs' expert. App. 101a-102a.

[7] Significantly, as the 1994 court of appeals panel noted, the *Hartman* class action is not an "across-the-board" case (App. 234a), nor is the class comprised of promotion claims combined with hiring claims, a significant concern to this Court in *Falcon*. App. 236a.

[8] Petitioner cites to no authority for the proposition that class certification cannot, in any event, be supported by a statistical presentation in addition to other evidence.

In sum, the court of appeals did not expressly, or by implication, hold that this class action or any other may be certified *solely* on the basis of statistics. The court of appeals simply made no such broad pronouncements about the use of statistics, despite Petitioner's implications to the contrary. In fact, since the decision regarding the use of statistics is based, in significant part, on waiver, the opinion is heavily fact-dependent and has limited applicability beyond the precise reaches of this litigation. Petitioner's argument simply falls. As a result, neither the federal courts in the District of Columbia nor elsewhere stand in any danger of being overrun with impermissibly certified class actions.

On his first issue, then, Petitioner has failed to appeal any error, to preserve any issue with regard to the ruling actually made by the court of appeals, to assert any conflict with prior opinions of this Court or of the courts of appeals, or to offer any other basis mandating review by this Court.[9]

II. PETITIONER WAIVED HIS EXHAUSTION ARGUMENT BY FAILING TO RAISE THIS ISSUE IN HIS FIRST APPEAL.

Petitioner's second issue concerning exhaustion of administrative remedies suffers from similar defects as his first issue and is, therefore, unworthy of review by this Court. First, Petitioner does not ad-

[9] Importantly, the predicate for Petitioner's argument that review of this Court is necessary since the court of appeals' rulings "are so unprecedented that we cannot point to a conflict with decisions of other circuits" (Pet. 14-15) may be wholly explained by Petitioner's misstatement of the court of appeals' holding, rather than by any departure from existing precedent.

dress the holding of the court of appeals squarely since the record fully establishes Petitioner's waiver of this issue. Second, this case presents no issues of great importance to class action litigation, since the 1996 court of appeals' opinion rests upon a narrow principle of waiver. Finally, where Petitioner failed to appeal the ruling by the court of appeals affirming initial class certification, which decision was made without regard to intervention, Petitioner cannot reach the issue of exhaustion of administrative remedies with regard to those intervenors.

a. Petitioner seeks review of the court of appeals' determination that he waived any appeal arising from exhaustion of administrative remedies by class member-intervenors by failing to raise the issue in his prior attack on class certification in 1994 when the issue was fully developed. As pressed before the court of appeals in 1996, "the USIA disputes the district court's application of the vicarious exhaustion doctrine, claiming among other things that the few administrative complaints actually filed were not precise enough to fulfill the purposes of the doctrine, such as putting the agency on notice and allowing for administrative resolution of the claims." App. 4a-5a. In its rejection of the agency's position on the grounds of waiver, the court of appeals reviewed the record as it stood prior to the agency's 1994 appeal in conjunction with the agency's 1996 appeal and held:

> The USIA had ample opportunity to raise the exhaustion issue on its previous appeal when it challenged class certification. Its theory here depends simply on the absence of individual exhaustion and on the vagueness of the adminis-

> trative complaints of those who did exhaust. As the vast majority of the members of the class have not exhausted their administrative remedies (and in fact the intervenors are and *have always been members of the class*), the filing of petitions for intervention as named plaintiffs did nothing to enhance defendant's ability to raise the issue of exhaustion by plaintiffs who in fact failed to exhaust their remedies personally.

App. 5a (emphasis added).

The court of appeals was exactly correct. In its brief on the 1996 appeal, the agency argued that the administrative complaints filed by originally named plaintiffs failed to serve the function expressed in *Foster v. Gueroy*, 655 F.2d 1319 (D.C. Cir. 1981), that is, to put the employer on notice of the wrongdoing and to permit possible conciliation on a class basis. Petitioner's central point was, however, that "vicarious exhaustion was effectively impossible with regard to *many claims*," an argument focusing on the initial administrative complaints of the originally named plaintiffs viewed from the perspective of the entire class, not just the intervenor-classmembers. Brief for Appellant (1996 appeal), 24, 21-27 (emphasis added).[10]

Petitioner does not address his failure to raise the exhaustion issue in his 1994 appeal because the record does not support his position. Prior to the agency's 1994 appeal, a broad-based attack on nearly every

---

[10] As observed by the court of appeals in 1996, Petitioner was well aware of the exhaustion of administrative remedies issue since he himself had raised it much earlier with regard to another plaintiff in the 1982 appeal. *DeMedina v. Reinhardt*, 686 F.2d 997, 1012-1013 (D.C. Cir. 1982) (App. 35a).

aspect of class certification, Petitioner could have asserted, for example, that the administrative processes of named plaintiff Carolee Brady Hartman and named plaintiff Toura Kem were insufficient to provide notice to the employer of the class-nature of the claims so as to permit early resolution of the dispute. By the time of the original certification, and long before the narrowing of the class through the 1984 liability decision and again in the 1988 remedial decision, the processing of both Ms. Hartman's complaint and Ms. Kem's complaint was complete.[11] In fact, Petitioner had full knowledge of the allegations in those complaints prior to the liability trial in 1979 and their use as the predicate to exhaust the administrative remedies on behalf of the class they represented.[12]

Prior to and during the 1987 remedial trial, Petitioner himself hotly contested the administrative claim of Ms. Kem in particular. In that remedial proceeding, Petitioner had specifically asserted, among other things, that Ms. Kem's administrative

---

[11] Ms. Kem's administrative complaint, filed in 1974, served as the basis for determining the opening date of the class, a decision made by the district court in 1988, years prior to Petitioner's 1994 appeal. App. 127a-133a.

[12] Following the remedial trial and notice to the class in 1988, the identities of the class members were known to the Petitioner as well as the nature and extent of their claims. Claim forms were served on Petitioner during 1989 and his individual responses to those claims (through Petitioner's sworn declarations addressed to each and every one), under the guidance of the Order of Reference (entered September 30, 1991), were forthcoming prior to his filing of the appeal that resulted in the 1994 appellate decision.

charge was insufficient to notify the employer of the class nature of the claim and whether, at the time of consolidation of Ms. Kem's suit into the class suit, her claim "raised substantive issues different from those raised by Ms. Hartman's case." App. 133a. Rejecting Petitioner's concerns regarding the use of Ms. Kem's 1974 administrative complaint to establish the opening date for the class, the district court found in its remedial opinion:

> [Petitioner] is wrong to allege that Ms. Kem's charge provided no notice of the possibility that defendant might face a class suit. By explicitly calling her charge a claim of discrimination "against females" at USIA, Def. Ex. 93, Part III, and not just on her own behalf, Ms. Kem surely informed [Petitioner] that a class suit might follow. Indeed, she may actually have come as close to filing a class administrative claim as was then possible. Thus, the contention that Ms. Kem's claim cannot be the administrative predicate for this class lawsuit cannot stand.

App. 131a. Notably the district court relied upon, among other authorities, *Foster v. Gueory*, the self-same authority on which Petitioner here relies. App. 130a. Although without doubt Petitioner had each and every tool at his disposal necessary to perfect an appeal in 1994 based upon Ms. Kem's charge, Petitioner did not appeal the district court's findings with regard to Ms. Kem's administrative charge, in any respect, during his 1994 assault on class certification.

As with Ms. Kem's administrative complaint, Ms. Hartman's complaint was fully developed well prior to even the district court's 1984 liability opinion, and Petitioner was obligated to appeal the applicability

and utility of Ms. Hartman's complaint, on penalty of waiver. Nevertheless, despite his broad-based attack on class certification, resulting in the 1994 court of appeals' opinion, Petitioner neither noted nor argued the nature, scope, or sufficiency of either Ms. Kem's or Ms. Hartman's administrative charge (or both) to exhaust administrative remedies on behalf of the entire class.

On this record, then, Petitioner has no grounds to argue that he has not waived the exhaustion issue with regard to every member of the class. Petitioner had his opportunity, as the court of appeals held, and simply did not raise the issue. App. 5a.

In his Petition, however, Petitioner frames his designated issue solely with regard to the post-remand intervenors and asserts he lacked notice of their claims. Pet. Questions Presented. This ground falls as well since, as noted earlier, Petitioner knew, prior to the 1994 appeal, the identity and claims of each and every class member.

This Court has previously held that the requirement of exhaustion of administrative remedies in a Title VII case is not jurisdictional, and is therefore subject to waiver. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). Where, as here, a petitioner fails to discharge his duty to appeal at the earliest practicable juncture a fully developed issue, he waives that issue. *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990); *see also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir.), *cert. denied*, 116 S.Ct. 180 (1995); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d

1071 (D.C. Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1181 (1985).

In sum, Petitioner has failed to preserve this issue, and where the record not only does not support Petitioner's position, but rather actively undermines it, review by this Court is particularly inappropriate. Moreover, where the holding of the court of appeals rests on waiver, and thus on strategic decisions of the litigants, the decision has narrow application and is heavily fact-bound. As a result, no broad class action management issues are implicated, except perhaps to counsel litigants that issues must be promptly pursued and those left fallow will not be revived to rescue them from the effects of their strategic decisions.[13]

b. Petitioner also attempts to assert that without review of this Court the opinion of the court of appeals imperils the requirement of exhaustion of administrative remedies under Title VII, effectively overturning class action law. Pet. 23-24. No such threat arises, or could arise, from the decision of the court of appeals since the opinion turns wholly on the issue of waiver, that is, whether *this litigant* had an opportunity to raise an issue in a prior appeal and simply failed to do so. App. 5a. Far from broadly implicating class litigation, this issue is heavily dependent upon factual issues and turns on strategic decisions made by one party to the litigation. Since

[13] Although Petitioner offers the specter of wholesale discovery from unnamed class members as yet another basis for this Court's granting of his Petition, no such effects could flow from the court of appeals' decision since Petitioner himself *stipulated* that no discovery was necessary for the district court to address class certification issues. App. 271a, n.9.

the decision has only narrow application to the record before the court of appeals, the decision contains no broad implications for class action case law generally.

Additionally, however, there is a significant question of whether the issue of exhaustion of administrative remedies by class member-intervenors is simply academic and of no particular moment to class certification. Since a district court, considering the issue of class certification, may rely on evidence from class members and is not restricted to evidence from intervenors and named plaintiffs, the issue of whether the intervenors had or had not exhausted administrative remedies does not affect that district court's class certification decision. Petitioner has not appealed the court of appeals' affirmance of the initial class certification (decided without the evidence provided by intervenors), and the affirmance of current certification of the class does not depend upon the granting of intervention of additional named plaintiffs. The issue of exhaustion, then, has no practical effect on the progress of the litigation. As a result, Petitioner's exhaustion issue is simply moot.

In conclusion, Petitioner has not established any conflict of law between and among the courts of appeals as a basis for his Petition. Nor has Petitioner demonstrated any departure from the accepted and usual course of judicial proceedings requiring the exercise of supervisory authority of this Court. Finally, Petitioner has not established any compelling issue with broad implication for class action suits. In fact, none of the arguments pressed by Petitioner serve as a compelling reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRUCE A. FREDRICKSON *
SUSAN L. BRACKSHAW
LINDA M. CORREIA
JONATHAN C. PUTH
WEBSTER & FREDRICKSON
1819 H Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 659-8510

* *Counsel of Record for the Respondents*

April 24, 1997